84-534

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No. 84-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HUGH JAMES QUIGLEY,

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF FLORIDA SECOND JUDICIAL DISTRICT

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54pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the effective date of the Federal Home Loan Bank Board's due-on-sale Regulation 12 C.F.R. 545.8-3(f) is June 8, 1976 or July 31, 1976.

2. Whether Regulation 12 C.F.R. 545.8-3 (f) preempts the equity jurisdiction of Florida courts.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

HUGH JAMES QUIGLEY,

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF WINTER HAVEN,

Respon[illegible]

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, SECOND DISTRICT

The Petitioner, Hugh James Quigley, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Second District Court of Appeal of Florida, the state court of last resort. Petition for Review was denied by the Florida Supreme Court on July 5, 1984.

OPINIONS BELOW

The Circuit Court of Polk County, Florida, entered a final summary judgment for petitioner on May 9, 1983. The Second District Court of Appeal of Florida entered its judgment on denial of petition for rehearing, which reversed the summary judgment of the trial court, on February 29, 1984. First Federal Savings and Loan Association v. Quigley, 445 So. 2d 1052 (Fla. 2nd DCA 1984). The Florida Supreme Court denied petition for review on July 5, 1984. Quigley v. First Federal Savings and Loan Association, Case No. 65,115.

JURISDICTION

Pursuant to denial of the petition for review by the Florida Supreme Court, the decision of the Second District Court of Appeal of the state of Florida became a "final judgment*** rendered by the highest court of a State in which a decision could be had***" pursuant to the provisions of 28 U.S.C. Section 1257.

The jurisdiction of the court is invoked under the provisions of 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This petition involves the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution, Federal Home Loan Bank Board Regulation 12 C.F.R. §545.6-11, 12 C.F.R. §545.8-3(f) and (g), Federal Home Loan Bank Board Resolution 76-296, and Florida Statutes §§702.01 and 45.031 (1981).

STATEMENT OF THE CASE

On July 23, 1976, Jack Cobb and Lillian Cobb (hereinafter "COBB") executed and delivered a mortgage encumbering certain real property to the respondent, First Federal Savings and Loan Associaion of Winter Haven ("FIRST FEDERAL"). Paragraph seven(7) of the mortgage contained the following lanuage:

> "No conveyance of said property, or any part thereof, shall be made by mortgagor without the written consent of mortgagee and without assumption by the grantee in the form prescribed by mortgagee of the obligation to mortgagee hereunder; in any event mortgagee may, upon such conveyance by mortgagor, deal directly with mortgagor's grantee without any notice mortgagor in all respects pertaining to this mortgage, and may forbear to sue or may extend times for payment of the debt secured hereby withourt discharging or in any way affecting the liability of mortgagor hereunder."

On August 25, 1982, the petitioner, Hugh James Quigley ("QUIGLEY"), contracted to purchase the Cobbs' home.

Quigley applied to First Federal for approval of assumption of the mortgage. First Federal agreed to approve Quigley for assumption subject to the following provisions:

1. Service Charge of a five(5) point fee, no interest rate adjustment, with a one(1) year balloon payment of the entire balance of the mortgage.

OR

2. Service Charge of a Two (2) point fee, with an interest rate ajusted to 12and 3/4% from the current 8½% fixed rate.

Petitioner declined both provisions and on October 21, 1982 instituted an action for declaratory judgment and other relief against First Federal.

First Federal filed a Motion to Dismiss which was denied by the trial court on February 1, 1983.

On February 21, 1983, Quigley filed a Motion for Summary Final Judgment which was granted by the trial court on May 9, 1983.

The trial court based its holding on the fact that the subject mortgage was executed on July 23, 1976, a date prior to the effective date of the Federal Home Loan Bank Board's regulation, and that the lanuage contained in the mortgage did not constitute an enforceable due-on-sale clause.

The Second District Court of Appeal of Florida entered its opinion on February 29, 1984 (Appendix A). The decision reversed the judgment of the trial court. The Supreme Court of Florida denied a petition for review on July 5, 1984 (Appendix B).

Petitioner points out that pursuant to his sales agreement with the Cobbs, he purchased the subject property and is currently the owner of the real estate encumbered by First Federal's mortgage.

ARGUMENT

I. THE EFFECTIVE DATE OF FEDERAL HOME LOAN BANK BOARD REGULATION 12 CFR 545.8-3(f) IS JULY 31, 1976.

Rule 17.1(c) of this Court, pertaining to review on certiorari provides:

> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

It is respectfully submitted that the ruling of the court below brings this case within the purview of this section.

The effective date of Regulation 12 C.F.R. §545.6-11(f), now recodified with minor modification not relevant here as 12 C.F.R. 545.8-3(f), is July 31, 1976. The specific reference to this effective date is found in 41 FEDERAL REGISTER 18287 (Appendix C), left-hand column, starting with the thirty-second (32nd) line from the bottom, and states:

"C. Effective Date. Effective date is 7/31/76; proposal specified 5/31/76." (Appendix C)

This Court in the case of Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 73 L. Ed. 2d 664 (1982) dealt with the issue of whether the Federal Home Loan Bank Board's due-on-sale regulation pre-empted California's Wellenkamp ruling to limit a federal savings and loan association's right to exercise a due-on-sale provision to those cases where the lender could demonstrate that the transfer had impaired its security.

When de la Cuesta first appeared in the advance sheets, this Court noted that the effective date of the due-on-sale regulation was July 31, 1976. On July 3, 1982, Mr John E. Gunther, Deputy Director of the Litigation Division, Federal Home Loan Bank Board, requested that the Court change the effective

date of the regulation to June 8, 1976 (Appendix D).

Mr. Henry C. Lind, Esq., Reporter of Decisions , wrote to Mr. Gunther on July 7, 1982, and advised him that the Court had declined to substitute the date of June 8, 1976 for July 31, 1976, but would delete reference to any effective month and day.(Appendix E)

When the de la Cuesta decision finally appeared in the bound volumes in the United States Reports, the reference to July 31, 1976 was deleted, and the opinion reflects only that the regulation was enacted in 1976. The court below reasoned that since this Court dropped the reference to July 31, 1976, the effective date had to be June 8, 1976. This result does not comport with logic and reason.

The deletion resulted from the fact that the effective month and day of the regulation was not a material issue to this Court's decision. Two of the mortgages in de la

Cuesta predated the entire year of 1976, but at the time the regulation was enacted, California had always permitted the unfettered acceleration of due-on-sale clauses. This Court had no occasion, therefore, to consider whether the effective date of 12 C.F.R. §545. 8-3(f) is June 8, 1976 or July 31, 1976.

In the instant case, the effective month and day of the regulation is a material issue which needs to be resolved because, unlike California, pre-existing Florida law prohibted the use of due-on-sale clauses absent a showing of impairment of security. See, e.g., St. Martin v. McGee, 82 So. 2d 736 (Fla. 1955), Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d DCA 1970), Home Federal Savings & Loan Assn. of Palm Beach v. English, 249 So 2d 707 (Fla. 4th DCA 1971), Chopan v. Klinkman, 330 So. 2d 154 (Fla. 4th DCA 1976), Delgado v. Strong, 360 So. 2d 73 (Fla. 1978), First Federal Savings & LOan Assn. v. Lockwood, 385 So. 2d 156 (Fla. 2d DCA 1980),

Woodcrest Apartments Ltd., v. IPA Realty Partners, 397 So. 2d 364 (Fla. 1st DCA 1981), Consolidated Capital Properties v. National Bank of North America, 420 So. 2d 618 (Fla. 5th DCA 1982), and Orange Federal Savings & Loan Assn. v. Dykes, 433 So. 2d 642 (Fla. 5th 1983).

The lanuage of the Board's regulation creates confusion as to the effective date of the due-on-sale provision. A revision date appears in a portion of the 41 Federal Register 18287 (Appendix C) , right-hand column, commencing with the 28th line from the bottom, and provides that the revision date of §545.6-11 is effective June 8, 1976. However, since this is a restrictive regulation, a plain reading of the regulation is required and all ambiguities should be resolved against any impairment of previously vested rights.

The lower court ruled that the hiatus

period from June 8, 1976 to July 31, 1976 was justified in light of the Federal Home Loan Bank Board's view that due-on-sale provisions were already permitted under pre-1976 regulations. (Appendix A at footnote 4) However, in a footnote to the de la Cuesta opinion, this Court noted that the Board may contend that its authority for exercising the due-on-sale clauses was provided in a 1948 regulation, but apparently dismissed as without merit such reliance as it was not addressed further in the opinion. See de la Cuesta at page 147, fn. 4.

Under the decision of the court below, a six week "due-on-sale" limbo period is created which deprives petitioner of his vested rights.

It is respectfully submitted that this case clearly raises the effective date issue left open in de la Cuesta; and that the question presented warrants this Court's consideration.

II. REGULATION 12 CFR 545.8-3(f) DOES NOT PREEMPT THE EQUITY JURISDICTION OF FLORIDA COURTS.

This petition also involves the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution. The preemption doctrine emanates from the Supremacy Clause which in pertinent part reads:

> This Constitution, and the Laws of the United States which shall be made in pursuance hereof....shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

In creating our Constitution, the States surrendered certain powers to the federal government. However, the powers not surrendered to the federal government, or prohibited to the States are reserved to the states through the Tenth Amendment. The control of real property matters is one of these reserved rights.

The lower court ruled that the equity jurisdiction of Florida courts was for all intents and purposes preempted when this Court in Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982), held that California courts could not apply state law to prevent the enforcement of due-on-sale clauses. This interpretation of de la Cuesta serves to invalidate §§702.01 and 45.031 Fla. Stat. (1981), which provide that the foreclosure of mortgages is the sole province of the equity courts.

In determining whether a federal enactment precludes a state statute, the inquiry begins with congressional intent. Jones v. Rath Packing Co., 430 U.S. 519 (1977). The requisite congressional purpose to occupy the entire field of real estate mortgage law is clearly lacking in the case at bar.

Further, the interpretation and enforcement of contracts is, of course, traditionally

governed by state law. In Goldstein v. California, 412 U.S. 546 (1973), this Court held that state legislation, to be preempted, must be "absolutely and totally contradictory and repugnant" to the federal law. Id, at 553. An equitable analysis by a court of equity can not be characterized as such.

This Court has traditionally recognized that the areas of real property and mortgage law are controlled by state law. Butner v. United States, 440 U.S. 48 (1979); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Sunderland v. United States, 266 U.S. 226 (1924). In addition, since federal courts can not in the absence of normal diversity requirements handle state mortgage foreclosure actions, the application of the state court's equity powers, or the discretionary withholding of those powers, is not subject to preemption. There is a distinct difference between not respecting federal law and withholding an equitable

remedy. The decision of the trial court in the instant case was based on an interpretation of a mortgage provision, and not on whether there was an impairment of collateral.

The court below ruled that the subject mortgage contained an enforceable due-on-sale clause. This ruling was based on the misconception that de la Cuesta did not require one specifically worded and concise due-on-sale provision.

In direct contrast to the absence of any due-on-sale lanuage in the subject mortgage, is the concise due-on-sale clause used in most mortgages and designated as Paragraph 17. Paragraph 17 is contained in the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and Federal National Mortgage Association and reads:

> If all or any part of the property is sold or transfered by Borrower without Lender's prior consent, excluding (a) the creation of a lein or encumbrance subordinate to this Mortgage, (b) the creatrin of a purchase

> money security interest for household appliances, (c) a transfer by devise, descent, or by operation of law upon death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable. See, e.g., FNMA/FHLMC Uniform Instrument 6175.

Paragraph 17 is quoted in de la Cuesta as containing the required due-on-sale lanuage See footnote 2, 458 U.S. 145. Although paragraph 17 is not the only type of due-on-sale clause that allows for acceleration of the maturity of the debt, the validity of other clauses depends upon whether the clause includes one clear provision for the lender to declare all sums due and payable upon a transfer of the property without its consent. The subject mortgage shows on its face that it fails to meet the de la Cuesta criteria.

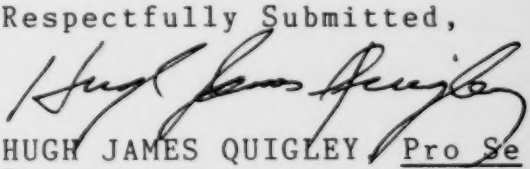
More than one individual's rights are involved. Unless reversed, the decision of

the lower court sets the stage for allowing acceleration of the maturity of mortgage debts regardless of whether the mortgage contains a due-on-sale provison as defined in de la Cuesta.

CONCLUSION

For the foregoing reasons it is respectfully suggested that a writ of certiorari issue to review the judgment and opinion of the Second District Court of Appeal of the State of Floirda.

Respectfully Submitted,



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APPENDIX

APPENDIX A

OPINION OF THE DISTRICT COURT OF APPEAL

OF FLORIDA, SECOND DISTRICT
(The Court Below)

(Reported At 445 So. 2d 1052)

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation, Appellant, v. HUGH JAMES QUIGLEY, Appellee.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

SECOND DISTRICT

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation,

Appellant,

v.

HUGH JAMES QUIGLEY,

Appellee.

CASE NO. 83-1203

Opinion filed Februaryl, 1984.

Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge.

Roy C. Summerlin and Debra L. Cline of Summerlin, Connor, and Braisted, Winter Haven, for Appellant.

Hugh James Quigley, Lake Wales, pro se.

GRIMES, Judge.

Once again we consider the effectiveness of a due-on-sale clause contained in a federal savings and loan association mortgage.

On July 23, 1976, Jack and Lillian Cobb gave First Federal Savings and Loan Association of Winter Haven (First Federal) a mortgage on their home. The mortgage contained the following paragraphs:

> 7. No conveyance of said property, or any part thereof, shall be made by Mortgagor without the written consent of Mortgagee and without assumption by the grantee in the form prescribed by Mortgagee of the obligation to Mortgagee hereunder. In any event Mortgagee may, upon such conveyance by Mortgagor, deal directly with Mortgagor's grantee without any notice to Mortgagor in all respects pertaining to this mortgage, and may forbear to sue or may extend times for payment of the debt secured hereby without discharging or in any way affecting the liability of Mortgagor hereunder.
>
> 23. If said note, or the interest thereon, or any of the sums of money herein referred to or secured hereby are not fully paid within thirty days after same, or any of them, become due and payable, or if each covenant, agreement, condition and stipulation of said note and this mortgage, or all of them, are not duly performed, complied with and abided by for a period of thirty days, Mortgagee

> shall have the option to accelerate the payment of the entire principal sum, with interest, as immediately due and payable without notice.

On April 25, 1982, Hugh J. Quigley (Quigley) contracted to buy the Cobbs' home. The purchase contract contained the folowing provision:

> Purchaser shall make application to FIRST FEDERAL SAVINGS & LOAN OF W. H. for the purpose of qualifying for the assumption of the existing first mortgage held by said bank, in the approximate balance of $43,500.00, and which has approximately 15 years to run, provided, however, that said first mortgage does not escalate above 8-1/2% per annum in its interest rate. The balance of the principal price in the form of a purchase money second mortgage which Seller sgrees to take back, for a period of fifteen (15) years, amortized on equal monthly installments, including principal and interest at the rate of 10% per annum. In the event either of the above-mentioned mortgages are not forthcoming, Buyer shall have the right to cancel this contract and receive immediate return of all deposit monies....

Quigley applied to First Federal for approval of assumption of the mortgage. First

Federal agreed to approve Quigley for assumption subject to the following options:

1. Service Charge 5 Point Fee, No Interest Rate adjustment, 1 year Balloon Payment

OR

2. Service Charge 2 Point Fee, Interest Rate adjusted to 12 3/4 % fixed rate.

First Federal also advised Quigley that should he consummate the sale without its approval, the mortgage would be accelerated. Rather than going forward with the purchase, Quigley brought a declaratory judgment action against First Federal.

While the suit was pending, the United States Supreme Court in Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982), rendered a sweeping decision determining that a Federal Home Loan Bank Board regualtion which permitted federal savings and loan associations to use due-on-sale clauses in their mortgages preempted

California law. Notwithstanding, the trial court enterd summary judgment for Quigley, holding that First Federal's due-on-sale clause could not be accelerated by virtue of the sale of the property and that First Federal could not condition its approval upon an increase in interest rates or the payment of mortgage loan points. First Federal appeals this ruling.[1]

The court below distinguished de la Cuesta on three grounds:

I. Mortgage executed before effective date of regulation.

The Cobbs' mortgage was executed and delivered on July 23, 1976. The court determined that the federal regulation authorizing due-on-sale clauses did not become effective until July 31, 1976. Two of the mortgages in de la Cuesta also predated the regulation, but at the time the regulation was enacted California had always permitted the unfettered acceleration of due-on-sale clauses upon the

sale of mortgaged property. It was only after the regulation was passed that the California Supreme Court first adopted a rule that due-on-sale clauses could not be enforced unless the security of the mortgage was jeopardized by the sale. Hence, the Supreme Court found it unnecessary to consider whether the regulation had retroactive effect. In the instant case, the trial court declined to give the regulation retroactive effect and concluded that, unlike California, preexisting Florida law prohibited the use of due-on-sale clauses absent a showing of impairment of security.

Actually, the regulation became effective before the mortgage was executed. When the de la Cuesta opinion first appeared in advance sheets, the Supreme Court noted that the effective date of the regulation was July 31, 1976. When the case finally appeared in the bound volumes, the reference to July 31 was dropped, and the opinion reflects only that the regulation was enacted in 1976. In

fact, the board's specific authorization for the enforcement of due-on-sale clauses is contained in 12 CFR § 545.8-3(f) (1982),[2] which became effective on June 8, 1976. 41 Fed. Reg. 18287 (1976). The confusion resulted because subsection (g) of the regulation which contains certain limitations on due-on-sale clauses in mortgages executed after July 31, 1976, was enacted to become effective on July 31, 1976.[3]

II. Lanuage of the mortgage does not constitute an enforceable due-on-sale clause.

The court also held that First Federal's due-on-sale clause could not be enforced because it did not contain the limitations required by subsection (g) of the regulation. Yet, subsection (g) did not become effective until July 31, 1976. The Cobb mortgage was executed during that short period of time in which due-on-sale clauses were specifically authorized without any limitations.[4] However, Quigley cannot complain because even

if subsection (g) had been in effect, none of its limitations would have been applicable to this transaction.

The due-on-sale clause most often used in loan instruments is paragraph 17 of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which is quoted in the de la Cuesta opinion. Quigley's argument that the lanuage of First Federal's mortgage fatally departed from the customary wording of due-on-sale clauses can not be sustained because de la Cuesta defined a due-on-sale clause as "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." 458 U.S. at 145, 102 S. Ct. at 3018, 73 L. Ed. 2d at 670. Paragraph 7 of the Quigley mortgage provided that the mortgaged property should not be

conveyed without the written consent of the mortgagee, and paragraph 23 specified that upon the failure to comply with any condition of the mortgage, the mortgagee had the option to accelerate payment of the entire unpaid balance. Regardless of the form of the lanuage, when read together, these provisions constitute a due-on-sale clause.

III. State courts' equity jurisdiction not subject to preemption.

Finally, the trial court reasoned that one who seeks to foreclose a mortgage in a state court must accept the equitable doctrines recognized by that court. Our court had originally adopted this analysis in First Federal Savings & Loan Association v. Lockwood, 385 So. 2d 156 (Fla. 2d DCA 1980), when we held that a state trial court could deny a federal savings and loan assocaition the right to enforce a due-on-sale clause absent an impairment of security. However, our view on preemption was clearly overruled in de la

Cuesta when the Supreme Court held that the California courts could not apply state law to prevent the enforcement of due-on-sale clauses in federal savings and loan association mortgages. Thus, we recently reversed the refusal to enforce a due-on-sale clause contained in such a mortgage. First Home Federal Savings & LOan Association v. Nance, 436 So. 2d 805 (Fla. 2d DCA 1983). See Washington Savings & Loan Association v. Concepcion del Portillo, 419 SO. 2d 805 (Fla. 3d DCA 1982), in which our sister court interpreted the de la Cuesta decision in a similar manner.

The summary judgment for Quigley is reversed. We also reverse the court's determination, attacked on cross appeal, that First Federal is entitled to charge a nominal transfer fee to cover the cost of changing its records to reflect a new ownership. This point was never an issue between the parties,

and there was no evidence introduced to support the court's conclusion that it was a routine and customary practice of savings and loan associations to charge a nominal transfer fee.

OTT, C.J., and CAMPBELL, J., Concur.

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1. The court'sdetermination that Quigley had the requisite standing to sue has not been challenged on this appeal.

2. 12 CFR §545.8-3(f) (1982) provides:

> (f) Due-on-sale clauses. An association continues to have the power to include, as a matter of contract between it and the borrower a provision in its loan instrument whereby the associaition may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to laons made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the

association and borrower shall be fixed and governed by that contract.

3. References to paragraphs (d) and (e) of the regulation suggest the reason for the differences in dates. Paragraph (d) pertaining to late charges was made effective on June 8, 1976, but an explanatory note in 41 Fed. Reg. 18287 (1986) points out that the effective date of paragraph (e) relating to limitations on late charges was delayed until July 31, 1976, to allow for an orderly transition and alteration of mortgage forms. Presumably the same rationale prompted the delay in the effective date of paragraph (g) concerning limitations in the due-on-sale clauses.

4. Evidently, the Federal Home Bank Board was not troubled over the creation of a hiatus period because of its view that due-on-sale clauses were already permitted under prior regulations. See de la Cuesta, 458 U.S. at 147, 102 S. Ct. at 3019, 73 L. Ed. 2d at 671.

APPENDIX B

SUPREME COURT OF FLORIDA

THURSDAY, JULY 5, 1984

HUGH JAMES QUIGLEY,	)	
Petitioner,	)	
vs.	)	CASE NO. 65,115
FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN,	)	
Respondent.	)	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

ADKINS, ACTING C.J., OVERTON, MCDONALD, EHRLICH and SHAW, JJ., Concur

18286 FEDERAL REGISTER VOL. 41, NO 86

RULES AND REGULATIONS

CHAPTER V--FEDERAL HOME LOAN BANK BOARD
[No.76-296]

PART 545--OPERATIONS

PART 556--STATEMENT OF POLICY

Amendments Relating to Late Charges and Due-on-Sale Clauses

Summary. The following summary of the amendmentsadopted by this Resolution is provided for the reader's convenience and is subject to the full explanation in the following preamble and to the specific provisions of the amendments.

I. Present Situation. The Federal Home Loan Bank Board permits Federal associations, if authorized by their loan contracts, to assess, impose, and collect late charges respecting delinquent periodic installment payments on such loans, and to declare the loan immediately due and payable if the borrower sells or transfers the real property securing the

loan without the consent of the association.

II. Final Amendment. A. A Federal association continues to be empowered to include as a matter of contract between it and the borrower, provisions in its loan contracts for assessment, imposition, and collection of a late charge respecting any deliquent periodic installment payment; and for the acceleration of the maturity of the loan, at the option of the association, if the borrower sells or transfers the loan security property without prior written consent of the association.

B. Limits are placed on the imposition and maximum amount of late charges, which may be collected by a Federal association on future loans secured by borrower-occupied homes.

C. Restrictions are placed on exercise of acceleration (due-on-sale) clauses contained in future loan contracts secured by borrower-occupied homes.

III. Differencs from Proposal. A. Late charges 1. A late charge may be imposed if an installment payment is not received by the associaiton within the grace period; proposal used date-of-payment concept, including payment by deposit in the mail.

2. The alternative seven day delinquency notice requirement in proposal is deleted; associations are required to make disclosure of late charge provision in any monthly billings.

3. A new statement of Policy is issued regarding disclosureand imposition of late charges in connection with existing loans.

B. Due-on-sale Clauses. A new Statement of Policy is issued regarding exercise of due-on-sale clauses and loans asssumptions.

C. Effective Date. Effective date is 7/31/76; proposal specified 5/31/76.

By Resolution No. 76-100 of February 6, 1976 the Federal Home Loan Bank Board proposed to amend §545.6-11 of the Rules and Regulations

for the Federal Savings and Loan System (12 CFR 545.6-11) for the purposes of clarifying and limiting the authority of Federal savings and loan associations in the area of late charges and due-on-sale clauses. Notice of such proposed rulemaking was duly published in the FEDERAL REGISTER on February 12, 1976 (41FR 6283-6287) with an invitation for interested persons to submit comments by March 22, 1976. On the basis of all relevant material presented by interested persons and otherwise available, the Board heeby adopts the changes as proposed, with modifications discussed below.

New paragraph (d) setting forth the authority of Federal associations to impose and collect late charges, is adopted substantially as proposed, except for a changed date reference.

Paragraph (e) - relating to limitations on late charges is adopted substantially as proposed, with certain modifications. The effective date of the limitations is July 31, 1976, rather than May 31, 1976, as proposed, to allow for an orderly transition and alteration of mortgage forms. Periodic installemnt payments must be received by the association within the 15 day grace period (or the next business day, if such grace period ends on a weekend or holiday) to avoid imposition of late charges, the proposal would have exempted installment payments deposited in the mail during the grace period. The modification is intended to alleviate confusion and expense related to ascertainment of payment date. Paragraph (e) provides further that any monthly billing coupon or other notice which an association may provide regarding installment payments due shall disclose the date after which a late charge may be assessed. The proposal would have required a seven day

notice as an alternative to disclosure through monthly billing, but the Board is persuaded that such notice is unnecessary in light of the disclosure made at other times by Federal associations, including disclosure at the time of loan closing. Paragraph 556.9(a) of the new statement of Policy adopted today, emphasizes the duty of associations to disclose this information.

Subdivision (e) (1) (iv) of §545.6-11 provides that late charges may not be assessed more than one time for the late payemnt of any one installment; this is unchanged from the proposal and menas that a borrower bringing current a loan which is 90 days delinquent could not be required to pay three late charges on the payment 90 days overdue, two late charges on the payment 60 days overdue, and one late charge on the payment 30 days overdue, but rather three late charges in all. Subdivision 545.6-11(e)(2)

provides that installment payments must be applied to the longest outstanding installment due; this is unchanged form the proposal and means that, in the example of the loan 90 days delinquent, the first payment is applied to the installment 90 days in arrears, the next to the installment 60 days in arrears, etc.

The last sentence of proposed paragraph (e) relating to limitations and restrictions on late charges imposed on loans made before July 31, 1976, has been removed form this provision and appears as part of the new Statement of Policy adopted herein at §556.9 (b).

Paragraphs (f) and (g) of §545.6-11, relating to Federal associations' authority regarding due-on-sale clauses are adopted substantially as proposed, with some portions re-written or re-numbered for clarification purposes only. The effective date of the limitations is July 31, 1976.

A ne Statement of Policy clarifying and interpreting the Board's policies pertaining to late charges and due-on-sale clauses is adopted by the Board at §556.9. Paragraph (a) expresses the Board's view that all contract terms affecting the borrower should be fully disclosed no later than the time of ioan closing. Paragraph (b) states that the Board disfavors the practice of imposing prepayment charges upon exercise of due-on-sale clauses with regard to laons made prior to August 1, 1976, on the security of borrower-occupied homes, and urges associations to curtail this practice in connection with such earlier loans in the absence of extraordinary circumstances. Paragraph (b) (2) describes considerations relevant to impositionof late charges with regard to laons made prior to August 1, 1976. Paragraph (c) expresses the Board's view that there may be circumstances other than those described in §545.6-11(g)(1) where an association should

consider waiver of its acceleration option. Paragraph (d) states the Board's expectation that in transactions covered by the loan assumption provision of §545.6-11(g)(3), associations should not increase interest rates in excess ofcurrent market interest rates for comparable loans made by the associations applying their normal underwriting standards. New paragraph (e) states the Board's interpretation with respect to maintenance of mortgage insurance in connection with the requirement of paragraph 545.6-11(g)(3).

Finally, it was and is the Board's intent to have late charges and due-on-ale practices of Federal associations governed exclusively by Federal law. Therefore, charging of late charges, and exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by §545.6-11 and the Board's new Statement of Policy. Federal

associations shall not be bound by or subject to any conflicting State law whcih imposes different late chargs or due-on-sale requirements, nor shall Federal associations attempt to impose a higher late charge than permitted in §545.6-11(e) or avoid the limitations on the exercise of due-on-sale clauses delineated in §545.6-11(g) on the ground that such higher charge or avoidance of limitations is permissible under State law.

Accordingly, the Board hereby revises §545.6-11 and adds §556.9 to read as set forth below, effective June 8, 1976.

APPENDIX D

July 3, 1982

Henry C. Lind, Esq.
Reporter of Decisions
Supreme Court of the United States
Washington, D.C. 20543

Re: Fidelity Federal Savings and Loan Association v.De La Cuesta, No. 81-750 (June 28, 1982)

Dear Mr. Lind:

Pursuant to our conversation yesterday, I am writing on behalf of the Federal Home Loan Bank Board ("Board"), an amicus in the captioned case, to request that the Supreme Court of the United States correct a minor error in its June 28, 1982 Opinion.

On pages 4, 13 (fn.11) and 28 (fn.24) the Opinion states that the Board's regulation specifically authorizing due-on-sale clauses, 12 C.F.R. §545.6-11 (f) (now found at 12 C.F.R. §545.8-3 (f), became effective on July 31, 1976. However the Board's Resolution adopting this regulation indicates that while the new restrictions in section (g) of the regulation became effective on July 31, 1976, 1/ the Board's specific authorization of enforcement of due-on-sale clauses contained in section (f) of the regulation, became effective on June 8, 1976. 2/ See 41 Fed. Reg. 18286-8. A copy of Board resolution No. 76-296 (April 28, 1976) and the pages of the Federal Register where the Resolution can be found are enclosed for the Court's convenience, with emphasis added.

1/ The Resolution states the "[t]he effective date of the limitations is July 31, 1976" and 12 C.F.R. §545.6-11 (f) and (g) repeatedly stated that the limitations apply "with respect to loans made after July 31, 1976." See 41 Fed. Reg. at 18287, 18288.

2/ The Resolution states that "the Board hereby revises § 545.6-11...to read as set forth below, effective June 8, 1976." See 41 Fed. Reg. 18287.

Because this minor mistake in the Opinion potentially could affect the public, the Board respectfully requests that the Court correct it. Thank you for your kind attention.

Very truly yours,

John E. Gunther
Deputy Director
Litigation Division

cc: Fred Crane, Esq.
Ernest Leff, Esq.

APPENDIX E

July 7, 1982

Mr John E. Gunther
Deputy Director
Litigation Division
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Fidelity Federal Savings and Loan Assn. v. de la Cuesta, No.81-750

Dear Mr. Gunther:

I am in receipt of your letter of July 3, 1982, regarding the above case. I referred it to Justice Blackmun, and I am authorized to inform you that the following changes are being made in the opinion prior to its publication in the United States Reports.

The first sentence on page 4 of the slip opinion is being amended as follows:

> Accordingly, the Board issued a regulation in 1976 governing due-on-sale clauses.

The first sentence in footnote 24 on page 28 of the slip opinion is being revised as follows:

> Pointing out that two of the deeds of trust were executed prior to the 1976 effective date of §545.8-3(f), appellees argue that the due-on-sale

regulation may not be applied
so as to destroy vested rights.

Very truly yours,

Henry C. Lind
Reporter of Decisions